

No. 15113
IN THE
**United States
Court of Appeals**
For the Ninth Circuit
1956 Term

GOODYEAR FARMS, a corporation;
ADAMAN MUTUAL WATER COMPANY,
a corporation; B. W. MULLINS,
JAMES H. SHARP, GEORGE W. BUSEY,
CARLON H. HINTON and Verna
HINTON, his wife, et al,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

GOODYEAR FARMS, a corporation;
ADAMAN MUTUAL WATER COMPANY,
a corporation; BILL W. MULLINS,
and RALPH ASHBY and GRACE ASHBY,
husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILE
DEC 29 1956
PAUL P. O'BRIE
APPEAL
FROM THE
UNITED
STATES
DISTRICT
COURT FOR
THE
DISTRICT
OF ARIZONA

**PETITION FOR REHEARING AND MEMORANDUM
OF POINTS AND AUTHORITIES**

EDWARD JACOBSON
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Attorneys for Appellants

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PETITION FOR HEARING

Appellants, by their counsel, hereby petition this Court for a rehearing with the object of securing a supplemental opinion

further defining this Court's direction concerning the extent of recovery permissible, if any, in this proceeding to one class of appellants considered by this Court in its Per Curiam Opinion filed December 3, 1956. Said class of appellants are those named defendants in the condemnation proceeding who also own tracts contiguous to their condemned acreage and for which non-condemned contiguous tracts they have already been awarded severance damages but for which said non-condemned contiguous tracts no compensation has been made them for "aircraft takings" (being such damage as is alleged to have resulted from four hundred take-offs and landings of jet planes over said lands at such low altitudes as to amount to an appropriation).

No request for oral hearing is made with this Petition. Nor is it the purpose of this Petition in anywise to object to any portion of the Per Curiam Opinion rendered. Instead, the sole purpose of this Petition is to insure that appellants proceed with the trial of that class of claims above described in such forum as is in accordance with the intent and direction of this Court and so avoid any further delay.

The grounds for this Petition are based upon the following language in the Per Curiam Opinion and particularly upon the italicized portion thereof:

"The first is the claim of lands contiguous to the air field that take-offs and landings of four hundred jet planes per day over lands in more or less proximity to the air field will amount to appropriation. We are clear that, if any such right exists as to lands outside the area condemned, it cannot be adjudicated in the present proceeding. *If an owner had lands here condemned and contiguous land lying outside the boundaries, he would have the right of compensation for damages suffered by the whole tract.* But in this event he is already a defendant and can appeal from the final judgment if he has not been awarded compensation for all of his rights taken or damaged."

Appellants are concerned that if the Court below construes this direction to refer to severance damages as distinguished from "air-

craft takings" on such non-condemned contiguous lands and if this Court did not intend to so limit permissible recovery in this proceeding, appellants will again be required to appeal to this Court or risk the loss of compensation for such takings by operation of res judicata. Contrariwise, if the Court below construes this direction to include the providing of compensation for "aircraft takings" in addition to severance damage on such non-condemned contiguous tracts in these proceedings, such being opposite to the appellee's construction, it can be expected that appellee might well be constrained to appeal, thus again occasioning further delay.

Therefore, appellants hereby petition this Court for a rehearing with the object of securing a supplemental opinion such as will direct the parties as to the intention of this Court with respect to the above described class of claims.

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Attorneys for Appellants

MEMORANDUM OF POINTS AND AUTHORITIES

At the time of oral argument before the Court, discussion was had concerning the case of *Boyd v. United States*, 222 F. 2d 493. This case appears to present the majority rule concerning the limit of recovery in condemnation proceedings for non-condemned tracts which are contiguous to and owned by owners of condemned tracts. On its facts the case presents a situation of startling similarity to the case at bar.

In the *Boyd* case, the United States of America condemned 15.7 acres of an 82 acre farm. The 15.7 acre condemned tract was to serve as the northern tip of a 5,139.47 acre air base. The Boyds objected to the \$1375 compensation awarded them by the District Court in that it failed to include any damages to the non-condemned contiguous 66.3 acres occasioned by numerous

low-flying planes from the base occupying the airspace above. By the same token, the Boyds objected to the District Court's refusal to admit any evidence as to such aircraft activity or proof as to diminution in market value occasioned by such alleged "aircraft takings."

The Circuit Court of Appeals (8th Circuit), after reciting the general severance damage rule, held:

1. No compensation should be awarded in the condemnation proceedings for damage that might result to a contiguous tract simply as a general consequence of the operation of the air base which damage would be no different (except presumably in degree) than that occasioned by neighbors whose farms adjoined the air base but had no land condemned therefor.
2. Such "general" damage gives rise to an independent right of compensation for the appropriation of an easement (citing *United States v. Causby*, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 206) presumably to be pursued in the Court of Claims as in the *Causby* case.
3. The 15.7 acres taken by condemnation was used only as the northern tip of the air base properties, and not as the runway or other key area which ". . . . would make it capable of contributing a direct and identifiable element of depreciation, out of the compenency of that which otherwise, as a matter of legal certainty, would simply be attributed to the project generally or as a whole". Therefore, the rule stated in the paragraphs numbered 1 and 2 above applied.

In the case at bar, those appellants owning non-condemned contiguous lands had their condemned lands used only as vacant "border area", being the phrase used by the Court in the *Boyd* case to illustrate those who were encompassed by the rule announced.

Appellants believe it to be the intention of this Court that the rule of the *Boyd* case apply to those appellants who had land condemned but who also owned non-condemned contiguous tracts

upon which they allege "aircraft takings". Appellants believe a supplemental opinion from this Court so stating would materially aid in the prompt administration of justice, the prevention of further appeals and delay, and the protection of all parties from the possible operation of the doctrine of res judicata in a manner such as would prejudice substantive rights.

Respectfully submitted,

EDWARD JACOBSON

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Attorneys for Appellants

CERTIFICATE OF COUNSEL

I, Edward Jacobson, counsel for the appellants in the above entitled action, do hereby certify that the foregoing petition for a rehearing of this cause and memorandum of authorities in support thereof is presented in good faith and not for delay.

EDWARD JACOBSON

Counsel for the Appellants

